(7)

No. 90-634



IN THE

# Supreme Court of the United States

October Term, 1990

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DAN COHEN,

*Petitioner,*

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

*Respondents.*

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ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

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## BRIEF OF PETITIONER

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PETITION FOR CERTIORARI FILED OCTOBER 17, 1990
CERTIORARI GRANTED DECEMBER 10, 1990

## QUESTION PRESENTED FOR REVIEW

Does the First Amendment of the U.S. Constitution grant newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate?

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### REPORTS OF OPINIONS IN THIS CASE DELIVERED BY COURTS BELOW

The opinion of the Minnesota Supreme Court (A-1) is reported at 457 N.W.2d 199 (Minn. 1990). The opinion of the Minnesota Court of Appeals (A-19) is reported at 445 N.W.2d 248 (Minn. App. 1989). The Order and Memorandum of the Minnesota District Court denying defendants' motion for judgment notwithstanding the verdict or new trial (A-61) is reported at 15 Med. L. Rptr.

2288 (Minn. Dist. Ct. 1988). The Order and Memorandum of the Minnesota District Court denying defendants' motion for summary judgment (A-77) is reported at 14 Med. L. Rptr. 1460 (Minn. Dist. Ct. 1987).

## GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Judgment of the Minnesota Supreme Court was dated July 20, 1990. Petition for writ of certiorari was docketed in the United States Supreme Court on October 17, 1990. Certiorari was granted on December 10, 1990. Jurisdiction of this Court is conferred by 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

Amendment XIV. § 1 . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

## STATEMENT OF THE CASE

On October 27, 1982, Dan Cohen, then working for Minnesota Republican gubernatorial nominee Wheelock Whitney in his position as public relations director of a Minneapolis advertising agency, contacted reporters of Minnesota's two largest newspapers — the Star Tribune of Minneapolis and the St. Paul Pioneer Press. In separate meetings with each reporter, Mr. Cohen stated:



> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents. A-3, A-21-22.

Mr. Cohen demanded commitments of confidentiality because he feared retaliation. A-3.

The reporters were experienced journalists covering the gubernatorial election who knew that he was an active Republican associated with the Whitney campaign. They agreed to his conditions and promised him confidentiality. A-3.

Mr. Cohen then gave each authentic copies of public court records documenting Democratic lieutenant governor candidate Marlene Johnson s arrest for unlawful assembly in 1969, her conviction of petit theft in 1970 and the 1971 vacating of it. A-3-4.

Star Tribune reporter Lori Sturdevant told Mr. Cohen, "This is the sort of thing that I'd like to have you bring by again if you ever have anything like it." Pioneer Press reporter Bill Salisbury told him the documents were "political dynamite." A-23.

Mr. Cohen also contacted reporters from the Associated Press and WCCO-TV (the Minneapolis CBS affiliate) and gave them the same documents after each promised him confidentiality. A-4, A-22-23.

The Associated Press and WCCO-TV honored their promises. The former published a story without identifying

Mr. Cohen; the latter did not broadcast the story. A-4, A-26; Pl.Ex. 39, R. 393-94; J.A. 11-12.

In contrast, after being informed of the promises to Mr. Cohen, editors of the two newspapers decided to use the documents supplied by him but to renege on these promises.

The executive editor of the Pioneer Press Dispatch, David Hall, quickly decided to disclose Mr. Cohen's identity after learning of his reporter's promise and testified, "Honestly, I don't think that we ever considered doing it another way other than using his name." R. 1428-30, 1440, 1457, 669; A-25.

Star Tribune editors also decided to disclose Mr. Cohen's identity, despite Ms. Sturdevant's promise. According to their testimony, the decision was made by a group convened by an editor in the afternoon called a "huddle." A-24. Ms. Sturdevant was not part of the "huddle" and had no other input into whether her promise was to be honored or dishonored. A-24.

Even so, Star Tribune editors instructed her to ask Mr. Cohen to release the Star Tribune from what editor Frank Wright called "this agreement." A-24. R. 1490. She telephoned Mr. Cohen two or three times, but each time Mr. Cohen refused to allow his name to be published. The editors did so anyway. A-24.

Both Ms. Sturdevant and Mr. Salisbury objected strongly to this dishonoring of their promises. Ms. Sturdevant demanded that her name not appear on the published story. A-5, A-24, A-25.

The next day, October 28, both newspapers published articles about Ms. Johnson's arrests and conviction which identified Mr. Cohen as the source of the information. The Star Tribune's front page article also named Mr. Cohen's



employer. A-6, A-25, P1.Ex. 21, R. 194; P1.Ex. 24 and 25, R. 197-98; J.A. 1-10.

Mr. Cohen was fired the day the articles were published. A-6.

The following day, the Star Tribune published a column attacking Mr. Cohen for supplying the documents to the newspaper. A-6, P1.Ex. 26, R. 209, 211. The day after that, the Star Tribune published an editorial cartoon depicting Mr. Cohen as a garbage can labeled "last minute campaign smears." A-6, Pl.Ex. 22, R. 213-14.

On October 31, the Pioneer Press and on November 1, the Star Tribune published articles containing additional criticism of Mr. Cohen, attributed to his former employer, for giving the court documents to the newspapers. Pl.Ex. 27 and 28, R. 214-17.

None of these articles disclosed that the newspapers had made and had broken promises to Mr. Cohen.

Sometime after Mr. Cohen was fired, the University of Minnesota hired him to produce some recruiting brochures. R. 229. On November 20, 1982, the Star Tribune published a column criticizing the University for employing Mr. Cohen. Pl.Ex. 23, R. 230. Information on Mr. Cohen's work for the University came from a confidential source never identified by defendants. R. 867-68. The columnist testified that it would be unwise for any public agency to hire Mr. Cohen and would not deny that his article would discourage other public agencies from giving work to him. R. 907-12. Before the article was published, the Star Tribune writer had called University officials and had questioned why they would use someone like Mr. Cohen. R. 405-7.

Some editors testified that they broke defendants' promises to Mr. Cohen because they deemed his identification

newsworthy. A-5, A-13, A-34, brief of Northwest Publications, Inc. in opposition to petition for certiorari at 5. However, one participant in the Star Tribune "huddle" testified that he would have honored the promise to Mr. Cohen if his newspaper had the story on an exclusive basis. R. 978-79, 1038-39.

David Nimmer, who has served as managing editor of the Minneapolis Star (a predecessor of the Star Tribune) and later as associate news director of WCCO-TV, testified that the newspapers "hung Mr. Cohen out to dry because they didn't regard him very highly as a source." R. 494. A former editor-in-chief of the Minneapolis Star testified that Mr. Cohen "was treated badly" by the defendants. R. 642.

On October 29, 1982, the Pioneer Press published an editorial, "Relevant Disclosures," which said that "too much is being made" about the source of the documents supplied by Mr. Cohen and that whether the Whitney campaign was involved was "irrelevant. To focus on how the information got to the public's attention is to overlook a larger issue. That is, the information about the lieutenant governor candidate, Marlene Johnson, is something the voting public deserves to know. . . . [I]t is legitimate to examine her past as part of an assessment of her fitness for public office." P1.Ex. 29, R. 218-19.

A few months earlier, a May 30, 1982, Star Tribune column took the position that public disclosure of the names of persons who commit crimes, especially public figures, is appropriate regardless of any resulting personal humiliation. R. 964-65.

Substantial evidence was presented at the trial of the media's dependence upon confidential sources. Ms. Sturdevant and Mr. Salisbury have given promises of confidentiality on a regular basis for many years. A-36. Ms. Sturdevant testified that she has personally made promises of confidentiality at least once a week and that it was a common practice. R. 448.



Star Tribune executive editor Joel Kramer testified that many articles on a daily basis contain information obtained from confidential sources. "It is part of the business and it occurs every day." He agreed that the newspaper gets many stories from confidential sources which it otherwise would not have. R. 1191-92, 1225.

Dr. Arnold Ismach, Dean of the University of Oregon School of Journalism, testified that frequently information cannot be obtained without promises of confidentiality which he termed "one form of currency that journalists use to get something they want and need, which is information." R. 695-96. He said that promises of confidentiality from investigative and political reporters are especially common, and that information on political candidates often comes from confidential sources not supporting the particular candidates. R. 690-93. He pointed out that a confidential source, "Deep Throat," exposed the Watergate scandal. To this day, his or her identity has not been disclosed. R. 694. Dr. Ismach testified that exposing the names of confidential sources would cut off the free flow of information to the public. "If sources who are willing to provide information on the basis of anonymity found that they could not trust those agreements, journalists feel, and I certainly agree, that those sources would dry up . . . . [T]he public is the ultimate loser." R. 716.

Another expert witness, Bernard Casserly, testified that the use of confidential sources is pervasive and is "a way of life" in the profession of journalism. R. 1279. At least

33 percent of newspaper stories and up to 85 percent of all news magazine sources have veiled attribution. R. 1278. High government officials often provide information only after first receiving promises of confidentiality, and 30 percent or more of the interviews in Washington, D.C. are off the record. R. 1267-68, 1278-79. Mr. Casserly testified that sources often seek promises of confidentiality because they fear loss of their jobs and other reprisals. He said that editors are or should be well aware of the consequences, such as loss of employment, if they dishonor promises of confidentiality. R. 1272, 1277, 1281-82; A-43.

Mr. Nimmer testified that the supply of factual but embarrassing information by confidential sources late in political campaigns is a common practice and has happened in every campaign he could recall. He said that many times such disclosure from political opponents is the only way in which the media obtains information to inform the public about the qualifications of candidates. R. 504, 506.

Witnesses employed by defendants testified that disclosing the names of sources promised confidentiality would reduce the flow of information to the public and would be unethical as well.

Past executive editor and current vice president and assistant publisher of the Pioneer Press, John Finnegan, criticized in a column a judge for saying "that he didn't believe that forcing newsmen to reveal sources or produce notes and tapes would hamper their ability to gather news. HIS POSITION IS RIDICULOUS. Of course, the inability of newsmen to protect their confidential sources and unpublished information will affect newsgathering operations. Sources will tend to disappear." Pl.Ex. 79, R. 1619-21 (emphasis in original).



In another column, Mr. Finnegan declared that a judge "ignored the law" by jailing a reporter for refusing to reveal his confidential sources to the court in a murder case he was investigating. He wrote, "If newspeople cannot keep sources confidential, those sources can dry up." Although one charged with a crime may need the best evidence to defend himself, "it is also clear that unless there is some protection of the right to gather news and protect sources, the quality and flow of news will be seriously impaired." Pl.Ex. 77, R. 1593-94.

Linda Kohl, a longtime investigative reporter for the Pioneer Press, agreed that reporters should not mislead or double-cross confidential sources, because "they're the ones who keep you in business." R. 1246.

Mr. Salisbury, who had allowed his name to appear on the Pioneer Press articles identifying the plaintiff, testified that some of his previous sources have been reluctant to give him additional information after his newspaper dishonored his promise to Mr. Cohen. R. 424.

Ms. Sturdevant testified that her editors' decision to dishonor her promise to Mr. Cohen could have adversely affected her credibility in being able to carry on her job as a reporter. R. 452.

About a year before the newspapers broke their promises to Mr. Cohen, Mr. Finnegan published a column in which he said that the violation of a promise of confidentiality would be a "dirty trick" and "unscrupulous," showing no concern for fairness and integrity, and that he would not hire someone who would do this. Pl.Ex. 76, R. 1590-91.

Many states have adopted shield laws protecting journalists from court orders to disclose confidential sources. In seeking passage of these laws, journalists have argued that

without such protection, the press and the public could not acquire information from sources requiring confidentiality. R. 696-97. Mr. Finnegan said that shield laws "are especially important in the field of investigative reporting where sources may fear for their lives, their jobs or the safety of their families if their identities are revealed, particularly in highly sensitive cases." R. 1592.

Defendants lobbied for adoption of the Minnesota shield law called the Minnesota Free Flow of Information Act. A-18 n.1. Minn. Stat. § 595.022 entitled "public policy" states that the public interest and the free flow of information require protection of the confidential relationship between reporter and source. It provides:

> In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of sections 595.021 to 595.025 is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

Mr. Cohen sued the newspapers for breach of contract and misrepresentation. The trial court, in its opinions denying defendants' motions for summary judgment and judgment notwithstanding the verdict, ruled that the First Amendment did not bar this action. A-66-69, A-79, A-86-88.

Finding liability on both claims, the jury awarded Mr. Cohen $200,000 in compensatory and $500,000 in punitive damages. A-2.



The Minnesota Court of Appeals, by a vote of two to one, affirmed the verdict of compensatory damages for breach of contract over defendants' First Amendment arguments. It reversed, however, the finding of misrepresentation and therefore the award of punitive damages, because Minnesota law does not allow punitive damages for breach of contract without an independent tort, A-7, A-41-42. Nevertheless, the Court of Appeals held that certain evidence was admissible "to show that the Tribune was acting with willful indifference to his rights and was continuing to disparage him while failing to disclose its own breach of promise." It also held that closing argument "comments on the newspapers' ignoble motivations are not unduly prejudicial." A-44.

The Minnesota Supreme Court, by a vote of four to two, reversed the compensatory damages award. It first held that a contract cause of action was inappropriate for promises of news source confidentiality even with the existence of an offer, an acceptance, consideration, and a breach and the intention of the promisors to keep their promises. A-7-10. It then held that, despite Mr. Cohen's injuries from reliance upon the newspapers' promises, enforcement of these promises under a contract implied by a promissory estoppel theory would violate the newspapers' First Amendment rights. A-11-14. "Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." A-13. The opinion said that there may be instances where a source may be entitled to a remedy for a broken promise of confidentiality, "when the state's interest in enforcing the promise to the source outweighs First Amendment considerations," but did not

indicate under what circumstances the First Amendment would not override such promises. A-14. Each dissenting justice wrote a separate dissent. A-14-18.

## SUMMARY OF THE ARGUMENT

This case raises the issue of whether the First Amendment empowers newspapers to inflict injuries with impunity by deliberately breaking undisputed and unambiguous promises of confidentiality in conducting their business of acquiring information. Journalists often can only obtain important information regarding government, politics, and other subjects by promising not to disclose the source's name.

The First Amendment protects the press from governmental coercion only. It is not applicable to suits for damages for the violation of voluntary promises not to publish certain information in exchange for other information possessed by private persons. No state action exists where a court fairly determines the intent of promisors and reaches a legal conclusion regarding the promises in terms of the neutral and nondiscriminatory rules of contract law.

This Court already has held that the First Amendment does not bestow a right to publish information in violation of obligations willingly incurred through an agreement or through the acceptance of conditions by which the information was obtained. *Snepp v. United States*, 444 U.S. 507 (1980); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). This Court also has recognized the importance of protecting expectations based on promises in return for goods or services provided in reliance upon them. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

When newspapers voluntarily give promises inducing others to provide goods or services, they waive any claimed



First Amendment right to evade their own obligations under the bargains. The newspapers' agents making the promises of confidentiality to Mr. Cohen were experienced reporters who knew of his background and knew the type of information he was to provide them. They understood that they were waiving the right to publish a potentially newsworthy item in return for obtaining another potentially newsworthy item.

Newspapers cannot employ the First Amendment to thwart a remedy for acts which would be unlawful when committed by anyone else. The First Amendment does not give the press a special privilege to violate the rights of others. *Branzburg v. Hayes*, 408 U.S. 665 (1972). In particular, the First Amendment does not protect the press from liability for calculated falsehoods, even in the course of covering political campaigns. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989).

The First Amendment does not give newspapers an automatic right to publish truthful information if it was acquired unlawfully. *The Florida Star v. B.J.F.*, 109 S.Ct. 2603 (1989).

Denying an injured person recovery for harm caused by the dishonoring of a promise would deprive him of the protection of the law without any countervailing benefit to the interest of the public in being informed. The media depend upon confidential sources for much of the news. In order to preserve the free flow of information, Minnesota and many other states have adopted shield laws to protect journalists from compelled exposure of confidential sources. Conferring upon newspapers a constitutional right to unilaterally violate promises of confidentiality would discourage potential sources and deny the public access to important information.

## ARGUMENT

### I.

### THE FIRST AMENDMENT DOES NOT ABROGATE VOLUNTARY PROMISES OR AGREEMENTS BY NEWSPAPERS.

#### A. The First Amendment only protects newspapers from governmental compulsion and does not apply to their voluntary conduct.

The First Amendment does not allow newspapers to escape the consequences of injuries inflicted upon others by repudiating promises they made voluntarily without governmental compulsion or any other duress.

In this case, the jury, the trial court, and two appellate courts have found that defendants injured the plaintiff by violating promises given to obtain information for use in their newspapers. The Minnesota Supreme Court called the dishonored promises "clear-cut," "without dispute," and "unambiguous." A-9, A-11. The jury found clear and convincing evidence that defendants not only violated plaintiff's rights but that their conduct showed a willful indifference to his rights. A-76. The Minnesota Court of Appeals upheld the admissibility of certain evidence showing that the Star Tribune was "acting with willful indifference to his rights and was continuing to disparage him while failing to disclose its own breach of promise" and also upheld closing argument comments on the defendants' "ignoble motivations." A-44. Even the opinion below said that "to break a promise of confidentiality which has induced a source to give information is dishonorable." A-8. Still, the Minnesota Supreme Court accepted the newspapers' argument that the First Amendment barred the jury from granting and the lower courts from upholding relief to Mr. Cohen.



The First Amendment protects the press from governmental action only. It is not a tool to undo bargains agents of media corporations entered into with private persons. Unlike that of the Minnesota Court of Appeals (A-28-31), the opinion below disregarded the difference between governmental coercion and private voluntary conduct. *See Board of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356, 2372 (1990).

In holding that the First Amendment barred enforcement of defendants' promises, the Minnesota Supreme Court relied upon *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which struck down a requirement that newspapers publish replies to charges against candidates. A-13. However, the present case involves no governmental compulsion over editorial judgment but, rather, the exercise of that judgment through a voluntary promise of confidentiality in return for desired information, a common business practice. Indeed, *Miami Herald* distinguished between consensual conduct and governmental coercion and stressed that it is the latter which implicates the First Amendment. 418 U.S. at 254. A later case, *Herbert v. Lando*, 441 U.S. 153, 167 (1979), held that *Miami Herald* "neither expressly or impliedly suggest[s] that the editorial process is immune from any inquiry whatsoever."

The Minnesota Court of Appeals (A-31) reasoned that contract law is "fundamentally different" from the application of state law of defamation to newspapers which has been held to constitute state action under the First Amendment. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Unlike defamation cases, rules of contract law do not restrict any particular published speech and serve purposes unrelated to the content of expression.

Contract law allows the press to choose — without governmental interference — the material to be the subject of its promise in exchange for something it wants from another party. The newspapers here voluntarily agreed not to publish certain information — the identity of Mr. Cohen — in order to obtain other information possessed by the source. Awards of contract damages do not sanction the contents of articles but instead compensate for injuries caused by the failure to honor a voluntary promise.

Newspapers do not have a First Amendment right of access to information possessed by Mr. Cohen or any other confidential source. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). They can acquire information from these sources only by means of a voluntary business transaction where anonymity is promised in return. Dean Ismach, R. 694-95.

As pointed out above in the statement of the case, journalists testified that promises of confidentiality are frequently used in conducting their business of obtaining information.

The petition for certiorari at 6-10 also discussed how dependent the press is upon confidential sources of information. Journalism executive and educator Richard M. Clurman has said that eliminating the use of confidential sources would carry a price "so high as to be unacceptable, not only to the press but to the public. Full disclosure would eliminate much of the most valuable information and insights that regularly appear in news stories." Abandoning the use of confidential sources would deprive the public of "a large percentage of the valuable, accurate and important stories that appear in print and on the air." R. CLURMAN, BEYOND MALICE: THE MEDIA'S YEARS OF RECKONING 158 (1988). In particular, a promise of confidentiality is "typically the price that a journalist must pay to



secure meaningful information about the operation of government for dissemination to the public." Langley & Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 Geo. Wash. L. Rev. 13, 26 (1988). "When it comes to stories that count, i.e., those that are embarrassing to government officials and politicians, the use of confidential sources is often a necessity." Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57, 74 (1985).

The newspapers were under no governmental compulsion to make their promises of confidentiality to Mr. Cohen. On the contrary, they exchanged these promises voluntarily for the valuable consideration of information. The First Amendment is not implicated where a jury and court fairly determine the intent of promisors and then reach a conclusion regarding the promises in terms of the neutral and nondiscriminatory rules of contract law. *See Evans v. Abney*, 396 U.S. 435, 446 (1970).

Defendants are asking, in effect, for an unprecedented interpretation of the First Amendment to convert it into a regulatory instrument to rewrite or supersede agreements bargained for by media organizations, to the prejudice of those who have relied upon voluntary promises of the media and have fully performed their part of these agreements.

### B. Newspapers do not have a constitutional right to evade obligations they voluntarily assumed through contracts or other conditions they accepted in order to obtain information.

The Minnesota Court of Appeals held that it was not "an undue burden to require the press to keep its promises." A-35.

Similarly, this Court has held that the First Amendment does not bestow a right to publish information in violation of obligations willingly incurred through an agreement or through the acceptance of conditions by which the information was obtained.

*Snepp v. United States*, 444 U.S. 507 (1980), held that a voluntary agreement not to publish is enforceable over claimed First Amendment rights. The decision stripped a CIA official of profits from a book published without CIA prepublication review as required by his employment agreement and upheld an injunction against future breaches of it. The Court rejected Mr. Snepp's claims that the First Amendment allowed him to violate the agreement.

> In his petition for certiorari, Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech. When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. 444 U.S. at 509 n.3.

The Court indicated that the enforceability of Mr. Snepp's agreement was not limited to the publication of information classified to protect national security (which his book did not contain) but that it applied to all information about his employer. 444 U.S. at 511, 515 n.11.

The trial court found that the relationship between journalist and source of information is not anything other than commercial, and it held that their agreements should be subject to laws governing commercial relationships. A-66. The Minnesota Court of Appeals held that an agreement



to provide the press with information, like any other service, is an appropriate subject matter for the law of contracts. The First Amendment does not render newspapers immune from the law for violating commercial contracts for goods and services. They should not be exempt from liability when they break promises made for the purpose of gathering news. "We find no reason to provide less protection to the reasonable expectations of a newspaper informant than we would to any other party to whom the newspaper makes a promise." A-33.

This Court has not previously addressed the specific issue of the relationship of the First Amendment to newspaper promises to confidential sources. It has, however, recognized the importance of protecting expectations based on promises in return for goods or services provided in reliance upon them. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978), acknowledged "the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."

The Supreme Court also has rejected claims of a First Amendment right to publish information received on condition of confidentiality. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), upheld an order prohibiting the publication of confidential information, covered by a protective order, obtained through discovery. "The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted access to that information and placed restraints on the way in which

the information might be used." 467 U.S. at 32. The decision quoted from *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965), "The right to speak and publish does not carry with it the unrestrained right to gather information." 467 U.S. at 32.

Trial judge Franklin Knoll found that defendants broke their promises to Mr. Cohen "after thoroughly considering what they were about to do." He held that no First Amendment interest exists in protecting "the knowing and willful breach of a legally sufficient contract after hours of thought and discussion by corporate officers," conduct which "can fairly be characterized as a calculated misdeed." A-68-69.

The creation of a constitutional privilege to renege on the obligations of voluntary agreements is not required to ensure freedom of the press and instead would be in conflict with important values. *See Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2707 (1990).

## II.

## DEFENDANTS WAIVED ANY PUTATIVE FIRST AMENDMENT RIGHT TO PUBLISH HIS NAME BY PROMISING NOT TO IDENTIFY MR. COHEN.

By knowingly and voluntarily promising Mr. Cohen that they would not disclose his identity in return for the documents he supplied, the newspapers waived the claim of a First Amendment right to publish his name in disregard of their promises. The opinion below failed to address at all the Minnesota Court of Appeals' analysis and holding (A-35-37) of defendants' waiver of any First Amendment rights through their reporters' promises.

Constitutional rights are subject to waiver through agreements. *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S.



174, 185-87 (1972). A recent Court of Appeals decision, *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania*, 853 F.2d 1084, 1096-97 (3d Cir. 1988), held that parties may waive First Amendment rights in particular. *Erie* rebuked a party's attempt to withdraw from its obligations after having the benefit of full performance by the other party.

The opinion below found that the exchange of promises of confidentiality for information is a common, well-established journalistic practice. A-5. The Minnesota Court of Appeals pointed out that the reporters who promised confidentiality to Mr. Cohen were seasoned journalists who had themselves given such pledges on a regular basis for many years before their promises in this case. Journalists never know exactly what information they will receive when they make these promises. Nevertheless, defendants' reporters must have anticipated that the plaintiff was to give them damaging information about a Democratic candidate; they knew that Mr. Cohen was working for the Whitney campaign, and he told them that the information might relate to a political candidate. The reporters knew of Mr. Cohen's prominence as an active Republican and thus knew that publication of his name could be of interest to the public. They understood, then, that they were waiving the right to publish a potentially newsworthy item in return for obtaining another potentially newsworthy item. A-36, A-37-38.

That court concluded that the waiver should be enforced as part of a negotiated agreement between private parties of equal bargaining power, experienced reporters on the one hand and an experienced political operative on the other. A-37.

Failure to recognize a waiver in these circumstances

would allow the press to extract full performance from other parties to its transactions while leaving it free to unilaterally repudiate its own commitments. Promises by newspapers would become meaningless if they are given the right to use the First Amendment to escape the consequences of violating even unambiguous and undisputed promises.

## III.

## THE FIRST AMENDMENT DOES NOT GIVE THE PRESS THE RIGHT TO VIOLATE THE RIGHTS OF OTHERS THROUGH INTENTIONAL MISCONDUCT.

### A. Newspapers are not immune from laws of general applicability.

Dissenting Minnesota Supreme Court Justice Lawrence Yetka wrote that the opinion below "offends the fundamental principle of equality under the law" by exempting newspapers from rules by which ordinary people are bound. A-15.Dissenting Justice Glenn Kelley agreed and reproached "the perfidy of these defendants, the liability for which they now seek to escape by trying to crawl under the aegis of the First Amendment, which, in my opinion, has nothing to do with the case." A-18. He said that any other person under similar circumstances "would most certainly have been liable in damages for breach of contract." A-17.

This Court already has indicated that wrongdoers cannot employ the First Amendment to thwart a remedy for acts which would be unlawful when committed by others. *Branzburg v. Hayes,* 408 U.S. 665, 682-83 (1972), held that the First Amendment does not invalidate the enforcement against the press of laws of general applicability despite the possible burden that may be imposed.



This holding was reiterated in *University of Pennsylvania v. Equal Employment Opportunity Commission,* 110 S.Ct. 577, 588 (1990). The Court held in *Branzburg* that a publisher "has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." The press "is not free to publish with impunity everything and anything it desires to publish." There it was claimed that requiring identification of sources promised confidentiality would impose an unconstitutional burden on news gathering. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 150 (1967), contained similar language and emphasized that constitutional protection for the dissemination of information "does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others."

*Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 581-83 (1983), also stressed that states can subject newspapers to generally applicable regulations without creating constitutional problems. Generally applicable taxes, for example, impose no constitutionally significant burden on First Amendment rights, and the First Amendment does not require a state to grant exemptions from them. *Jimmy Swaggart Ministries v. Board of Equalization,* 110 S.Ct. 688, 697 (1990).

A decision last year rejected another claim that the First Amendment frees certain groups from laws restricting the conduct of everyone else. *Employment Div., Dept. of Human Services v. Smith,* 110 S.Ct. 1595, 1604 (1990), held that generally applicable state laws that have the effect of burdening a particular religious practice are enforceable without the need of showing a compelling governmental

interest. Allowing exceptions to rules governing the rest of society would produce "a private right to ignore generally applicable laws." Far from being required by the First Amendment, the Court declared that such a practice would be "a constitutional anomaly." The Court applied this decision in *Minnesota v. Hershberger*, 110 S.Ct. 1918 (1990).

### B. The First Amendment does not give newspapers a right to gather news through intentional wrongdoing.

Unlike the Minnesota Court of Appeals (A-30-31), the Minnesota Supreme Court regarded the enforcement of its promises as an "impermissible restriction" upon the press under *New York Times v. Sullivan*, 376 U.S. 254 (1964). A-12 n.6. *New York Times* itself made no mention of erecting constitutional barriers to those seeking redress for violations of promises by newspapers. Instead of merely following precedent, the opinion below goes far beyond *New York Times* by validating a wrongful means of gathering news through the deliberate dishonoring of promises.

*New York Times* gave protection to journalists from liability for inadvertent errors committed in the course of doing their jobs honestly. It did not free them from the consequences of knowing and deliberate misconduct like the calculated violation of a clearcut promise. This Court has not condoned intentional or reckless wrongdoing by the press even for defamation of public officials.

Instead, the Court has condemned the use of lies by the press as not deserving of constitutional protection.

> But the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function .... "For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967) (emphasis in original).



*Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678, 2696 n.34 (1989), agreed and added, "Of course, the protection of 'calculated falsehoods' does not promote self-determination."

The aforementioned cases denounced calculated falsehoods in the form of knowing and deliberate defamation. The infliction of injury by the knowing and deliberate violation of clear-cut and undisputed promises deserves equal censure and is unworthy of constitutional protection. The First Amendment should not be construed to authorize lies in any form.

On the specific subject matter of this case, the First Amendment does not confer a license to break promises given in return for information relating to political campaigns. A promise made to obtain information on office seekers should be judged by the same rules as any other promise. The Court emphasized in *Harte-Hanks*, 109 S.Ct. at 2696, that it has not accorded the press absolute immunity in its coverage of elections.

### C. Newspapers do not have an unlimited right to publish truthful information.

From the inception of this case, defendants have argued that they should not be liable to Mr. Cohen for the consequences of breaking their promises, because their articles identifying him contained truthful information. Brief of Northwest Publications, Inc. in opposition to petition for certiorari at 12 n.3. Defendants' publication of truthful information was selective, however; the articles identifying Mr. Cohen did not disclose that the newspapers had made and had broken promises to him. A-6, A-25. That notwithstanding, the publication of truthful information does not automatically afford immunity from liability.

*The Florida Star v. B.J.F.*, 109 S.Ct. 2603, 2608-9, 2610 n.8, 2613 (1989), protected the publication only of lawfully obtained truthful information and refused the invitation to hold that the publication of unlawfully acquired truthful information may not be punished. Likewise, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103, 104, 105-6 (1979), noted repeatedly that First Amendment protection only applied to the publication of information which was lawfully obtained. As the Minnesota Court of Appeals indicated (A-35), information obtained through violated promises of confidentiality is not lawfully obtained.

In other cases discussed above, this Court has refused to recognize a right to publish truthful information in violation of an agreement or other condition which was accepted to obtain the information. *Snepp v. United States*, 444 U.S. 507 (1980); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

In another context, *James v. Illinois*, 110 S.Ct. 648, 651 (1990), held that certain truthful, but illegally obtained,



evidence must be excluded from criminal trials to protect people from disregard of their rights during investigations. Various rules limit the means by which government may conduct the "search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history." Newspapers should not be granted greater rights than judges, juries, and law enforcement officials to obtain information by violating the rights of others.

## IV.

## NO FIRST AMENDMENT INTERESTS ARE SERVED BY PROTECTING THE PRESS FROM THE CONSEQUENCES OF DISHONORED PROMISES OF CONFIDENTIALITY.

In upholding the jury's verdict for Mr. Cohen, Judge Knoll held that to deny an injured person recovery for demonstrated harm caused by the breach of an otherwise valid contract would deprive him of the protection of the law without any countervailing benefit to the legitimate interest of the public in being informed. A-69.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The opinion below recognized that the media depend upon confidential sources for much of the news supplied to the public. A-8.

Justice Kelley said that the opinion below "serves to inhibit rather than to promote the objectives of the First Amendment by 'drying up' potential sources of information on public matters." He pointed out that defendants in this case are claiming that the public's "right to know" justifies the violation of promises of confidentiality but

ironically argued for the same right-to-know to promote enactment of the Minnesota Free Flow of Information Act to protect these promises. A-18.

Confidential sources are relied upon most heavily in reporting about the subject of government. *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1299 (D. Minn. 1990). Justice Yetka warned that allowing newspapers to break promises for facts about political candidates will discourage other sources from providing material and thus reduce the amount of information made available to the public about the qualifications of candidates. A-15.

The opinion below granted that "if it is known that promises will not be kept, sources may dry up." A-8.

In protesting against orders by judges to expose sources and in seeking adoption of shield laws, defendants and others have argued that the disclosure of the names of sources promised confidentiality would curtail the flow of news to the public.[1] Confidential sources would even be more likely to disappear if this Court gives the press the right to unilaterally break its promises. Indeed, Mr. Salisbury admitted that after his name appeared as the writer of the Pioneer Press article identifying Mr. Cohen, some of his sources have been reluctant to give him further

[1]In addition to the testimony and authorities cited above, see *Matter of Farber*, 394 A.2d 330, 331, 333 (N.J. 1978). In that case, the Star Tribune filed an amicus brief supporting the position that court-ordered disclosure of confidential sources would seriously impair newsgathering and the dissemination of news, "because much information would never be forthcoming to the news media unless the persons who were the sources of such information could be entirely certain that their identities would remain secret." The result would be "a substantial lessening in the supply of available news on a variety of important and sensitive issues, all to the detriment of the public interest."



information for fear that his newspaper would break promises to them. R. 424.

The opinion below, and not the award of damages to Mr. Cohen for injuries which all courts below found he has suffered, would chill the flow of information to the public. The Minnesota Court of Appeals held (A-35):

> Were we not to enforce the newspapers' promises of confidentiality, confidential sources would have no legal recourse against unscrupulous reporters or editors. Ultimately, news sources could dry up, resulting in less newsworthy information to publish. Our decision enhances the legislatively expressed interest in protecting confidential news sources in order to promote the free flow of information to the media and, ultimately, to the public. *See* Minn. Stat. § 595.022.

Justice Yetka called it "unconscionable to allow the press on the one hand to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable." A-15.

Defendants had several valid options under their agreement with Mr. Cohen. They could have run a story similar to that of the Associated Press which did not reveal the name of the source. Or, like WCCO-TV, they could have declined to run any story at all. Alternatively, as the Court of Appeals pointed out, any interest the newspapers had in informing the public of the motivations of the source would have been satisfied by describing the source by type such as Republican activist without identifying him by name. A-34.

This case has implications beyond the violation of promises. If the press is not liable for dishonoring voluntary promises to obtain information, is it also entitled to commit torts or crimes in gathering news? The most widely used university textbook on the subject of investigative reporting, D. ANDERSON & P. BENJAMINSON, INVESTIGATIVE REPORTING (1976), R. 1568, acknowledges that this concern is not merely hypothetical. Chapter 2 (at 6) entitled "Ethics of Investigative Reporting" begins with the sentence, "Many fundamental techniques of investigative reporting involve actions some would label dishonest, fraudulent, immoral, and perhaps even illegal." R. 1810.

Two U.S. Court of Appeals decisions, rejecting claims that the First Amendment vests the press with immunity from liability for torts committed while gathering news, are also relevant to media claims that they should be free to break voluntary promises. In upholding limitations on a photographer's access to Mrs. Jacqueline Kennedy Onassis, *Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973), declared, "There is no threat to a free press in requiring its agents to act within the law."

*Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971), ruled that "there is no First Amendment interest in protecting news media from calculated misdeeds." Nor should the press be immunized from liability by the publication of facts wrongfully acquired. To do so "would encourage conduct by news media that grossly offends ordinary men."

The opinion below does not serve the purposes of the First Amendment. Instead, said Justice Yetka, "The decision of this court makes this a sad day in the history of a



responsible press in America." No one, including the news media, should be above the law. A-16.

## CONCLUSION

For the reasons stated in this brief and in the petition for certiorari, petitioner Dan Cohen respectfully requests that the judgment of the Minnesota Supreme Court be reversed and the judgment of the Minnesota Court of Appeals be affirmed together with interest in accordance with the law of Minnesota.

Respectfully submitted,

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Dated: January 22, 1991